

Exhibit A

A P P E A R A N C E S

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1 A P P E A R A N C E S (Cont.)

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1 their own exclusion or exception from the hearsay
2 rule, such as party admissions or as qualifying under
3 some other hearsay exception.

4 Obviously, the most clear example of that is
5 an FAA report that contains hearsay of other pilots.
6 In those cases, what happens is you just redact the
7 hearsay within hearsay from the FAA reports. Pretty
8 simple.

9 As Professor Weinstein goes on to say, even
10 if the official does not have firsthand knowledge and
11 the information does not satisfy some other hearsay
12 exception, admission of the report and its conclusions
13 may still be warranted if the trial judge finds that
14 the investigative report is reliable. Questions of
15 the qualification of the official can be raised to
16 indicate a lack of trustworthiness, especially
17 concerning any conclusions that are being offered into
18 evidence. However, other authorities suggest that
19 issues of qualification should go to the weight of the
20 report, not its admissibility.

21 So there we have it. And obviously the
22 difficulty here is just applying these general rules
23 to the specific report being offered, and it does get
24 rather messy at times. So that's what we have in
25 front of us.

1 nonfloating activities around the river.

2 Q. And does that include both the river and the
3 lake? Is this the watershed?

4 A. This is the -- the watershed. And so it
5 includes -- but I don't know if it includes the
6 lake.

7 MR. EDMONDSON: Okay. Your Honor, we
8 would offer Exhibit No. 5107.

9 THE COURT: Any objection?

10 MR. HOPSON: Yes, Your Honor. We have
11 several objections.

12 First of all, this is exactly the type of
13 hearsay under the public records exception. It
14 doesn't meet the requirements of the Tenth Circuit's
15 ruling in Denny, including the special skill or
16 experience of the official, the absence of any ability
17 to cross-examine or, frankly, have any kind of hearing
18 or public comment on this document.

19 On the very second page, the document is
20 talking about poultry litigation, poultry integrators,
21 and it's obviously a reference to anticipated
22 litigation here.

23 This is not an unbiased report of a state
24 agency; this is Mr. Tolbert's opinions. And while he
25 can certainly get on the stand and give us his

1 opinions, we shouldn't be admitting it in the form of
2 this document.

3 There's also the Daubert problem with this
4 document that is rife -- and I can cite you to
5 particular pages -- but over and over again it makes
6 statements of scientific fact and scientific
7 conclusion and scientific opinion, but there's no
8 Daubert process on it.

9 So we just do not think that this type of
10 document is the type of document that fits within the
11 category of factual findings under subsection (C).

12 THE COURT: Are there any portions of
13 the report as to which the defendants have no
14 objection?

15 MR. HOPSON: Your Honor, if they tender
16 a particular paragraph, I'd be happy to respond to
17 that, but I can't answer that question unfortunately
18 in the abstract.

19 THE COURT: Let me ask: Mr. Tolbert,
20 you've stated here this was issued on your first
21 day --

22 THE WITNESS: That's correct.

23 THE COURT: -- is that correct?

24 Who were the authors of this particular
25 report?

1 THE WITNESS: The -- it would have been
2 compiled from reports from the different state
3 agencies. The primary author was Mr. Strong, now
4 Secretary Strong.

5 MR. HOPSON: Well, Your Honor, we just
6 heard that this is a compilation of data from other
7 sources prepared by Mr. Strong. That's the exact
8 problem that Mr. Jorgensen's presentation was designed
9 to alert Your Honor to this morning.

10 THE COURT: Let me take a quick look at
11 it.

12 MR. EDMONDSON: Your Honor, while you're
13 looking, may I ask a follow-up question?

14 THE COURT: Yes, sir.

15 Q. (BY MR. EDMONDSON) Mr. Tolbert, the cover
16 page of that report recites that it was authorized by
17 the legislature in 2002.

18 A. That's correct.

19 Q. Who was governor in 2002?

20 A. That was Governor Frank Keating.

21 Q. And the Secretary of Environment at that
22 time?

23 A. Was Secretary Brian Griffin, his Secretary of
24 the Environment.

25 Q. Thank you.

1 THE COURT: It seems to me from a quick
2 review of this, Mr. Tolbert, this essentially is a
3 strategy for action. Is that a fair assessment of its
4 overall purpose?

5 THE WITNESS: That is the purpose of it,
6 as the title suggests, yes.

7 THE COURT: I don't know that it's
8 properly an exhibit. If there are portions of the
9 report here, I'll certainly consider admitting it.
10 But it seems to me to be an overall strategy for the
11 state, and it may be admissible for other purposes and
12 not with respect to the scientific data contained
13 therein. But at this juncture, it would appear to be
14 inadmissible.

15 MR. EDMONDSON: Your Honor, could I ask
16 a couple more questions?

17 THE COURT: You may, sir.

18 Q. (BY MR. EDMONDSON) You identified this as a
19 972 report. What do you mean by a 972 report?

20 A. There were -- it refers to Senate Bill 972.
21 That was the bill that directed the Secretary of the
22 Environment to compile this report.

23 Q. So it was prepared pursuant to authority
24 granted by law?

25 A. That is correct.

1 Q. Does it contain factual findings?

2 A. It does.

3 Q. And was it compiled prior to the instigation
4 of any litigation?

5 A. Yes.

6 Q. Initiated by a prior governor and a prior
7 Secretary of the Environment?

8 A. That's correct.

9 MR. EDMONDSON: Your Honor, if I might
10 just revisit briefly, I have heard no indicia of
11 unreliability from the defendants. This was a report
12 not only authorized, but directed by law to ascertain
13 whether there were problems in the watershed and to
14 work on a course of action to remedy them.

15 We're going to find these reports issued by
16 agencies of the State of Oklahoma and the State of
17 Arkansas repeatedly identifying poultry litter as a
18 pollutant and a problem in the watershed. If none of
19 those reports are going to be deemed admissible, then
20 what we will be about doing in the course of this
21 trial is calling everybody back in who did the
22 sampling, calling everybody back in who analyzed the
23 samples, and recompiling the reports during the course
24 of the trial.

25 THE COURT: Well, there, it would appear

1 that your main focus is the actual sampling data. I
2 was thinking, as you were speaking of this, that
3 perhaps it could be admitted for the limited purpose
4 of showing some sort of concerted action by the state,
5 obviously a Senate bill approved by the governor,
6 etcetera, to counter the defendant's argument that the
7 left hand and right hand are fighting each other
8 within the State of Oklahoma. This would at least
9 address in part that argument.

10 What concerns me is the specific scientific
11 data contained herein.

12 Counsel, your thoughts? Could you point me
13 to something in particular? Because for the record,
14 this is a 21-page document. There are references to
15 attachments here, attachments A through D, which are
16 not actually attached to this exhibit. But you're
17 concerned with regard to specific scientific data?

18 MR. HOPSON: Well, that's my point, Your
19 Honor.

20 First of all, we don't contest that this was
21 prepared by Mr. Tolbert's office pursuant to authority
22 granted by law. But our objection to this is it's not
23 a document that contains any factual findings by
24 Mr. Tolbert. All it does is repeat and compile
25 information, and as Your Honor pointed out, it's more

1 of a legal document than it is a scientific document.
2 It talks about here's our strategy, this is what we
3 did last year, this is what we hope to do next year.

4 Again, there's nothing in here -- if the
5 Attorney General will tender a particular page, that
6 there's a factual finding he'd like to have admitted,
7 we'll respond to it. But we don't think that this
8 kind of partisan -- to use the old-fashioned
9 common-law term -- self-serving hearsay should be
10 dumped into the record in this trial.

11 THE COURT: Well, specifically because
12 there is a split of opinion as to which side bears the
13 burden here with respect to unreliability, and it
14 appears that the cases, at least nearby here, put the
15 burden on you.

16 Specifically, what are you concerned about
17 here?

18 MR. HOPSON: Well, Your Honor, if you
19 just go to the second page, the executive summary, it
20 begins by saying that while Oklahoma was requiring its
21 municipal discharges to be a stringent one milligram
22 per liter phosphate, effluent limits and mandating its
23 poultry growers ceased the overapplication of poultry
24 litter. The State of Arkansas failed to follow suit.
25 Additionally, the poultry integrator companies that

1 operate in these watersheds refuse to assist their
2 growers with the cost of properly disposing of surplus
3 poultry litter.

4 I don't know whose statement that is. I
5 can't cross-examine the maker of this statement. This
6 is a statement that's been made after litigation, the
7 very litigation we're in here today had been
8 threatened, and these statements are throughout these
9 documents. There's one of these reports every year
10 and they're on the exhibit list for this witness, and
11 they're just going to come in.

12 And, of course, as the years go by as the
13 litigation ripens, the statements about my client and
14 poultry integrators get more robust.

15 THE COURT: Yeah. It actually was
16 issued before this litigation. This litigation --

17 MR. HOPSON: But the litigation had been
18 threatened, sir. That's what I was --

19 THE COURT: Correct, correct. There are
20 statements here contained in the report that do
21 constitute hearsay within hearsay.

22 Without redacting the report and maybe
23 putting your heads together, it would seem to me that
24 as an integrated whole, the exhibit should be -- or
25 the exhibit's admission should be denied at this

1 juncture.

2 MR. EDMONDSON: In its entirety?

3 THE COURT: Well, as I say, portions of
4 it may well be, but what I'm being presented is its
5 admission in its entirety. So to the extent that all
6 of the statements contained therein, including the
7 hearsay within hearsay, are being offered, the
8 objection's sustained.

9 MR. EDMONDSON: Your Honor, we would ask
10 for one point of clarification.

11 Of course, the plaintiff's position is that
12 Daubert does not apply to government reports. But
13 even if they do, we think, as the court indicated, the
14 burden of showing unreliability is clearly on the
15 defendants, and I would suggest that the fact that
16 they disagree with the statement does not make it
17 unreliable.

18 THE COURT: Well, and, of course, one of
19 the points that counsel points to is not a scientific
20 statement, but rather a statement with regard to
21 settlement position and refusal to assist growers with
22 the cost of properly disposing. Now, that may or may
23 not be true, but it's hearsay within hearsay.

24 So as it stands now, as I say, without
25 redacting, the objection's sustained.

1 watershed strategy for the Illinois River pursuant to
2 Senate Bill 972.

3 Q. And it's pursuant to statute?

4 A. That's correct.

5 Q. And who compiled it?

6 A. It was compiled by my office.

7 Q. The Secretary of the Environment?

8 A. Yes.

9 Q. Does it include a report on the number of
10 houses -- poultry houses on the Oklahoma and Arkansas
11 sides of the Illinois River Watershed?

12 A. Yes, I believe it does.

13 Q. And I think they may be at pages 8 and 11;
14 I'm not sure.

15 Do they give the source of the information of
16 those numbers? Or do you know what the source of
17 those numbers were?

18 A. The source of the numbers for the operations
19 in -- in Oklahoma is registration and then -- trying
20 to locate the discussion about Arkansas -- I think our
21 source for information for Arkansas is
22 typically -- would be an Arkansas agency.

23 Just a moment. Yes. It's on page 11 and
24 it's highlighted on the screen. The source of
25 information for the operations in Arkansas is the

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.)
W.A. DREW EDMONDSON, in his)
capacity as ATTORNEY GENERAL)
OF THE STATE OF OKLAHOMA,)
et al.)

Plaintiffs,)

vs.)

CASE NO. 05-CV-329-GKF-PJC

TYSON FOODS, INC., et al.,)

Defendants.)

TRANSCRIPT OF PROCEEDINGS
SEPTEMBER 30, 2009
BEFORE THE HONORABLE GREGORY K. FRIZZELL, DISTRICT JUDGE
VOLUME IV, P.M. SESSION

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1 are demanding my time. And, you know, it's not my job to go
2 through thousands of documents to determine whether or not that
3 document was listed numerous times and whether or not it was
4 objected to in certain cases and not in others. That's your
5 job. Go ahead.

6 MR. JORGENSEN: You're undoubtedly right, sir. And
7 wherever the mistake was, it's clearly ours and not the Court.
8 My proposal would be that I get together with the State tonight
9 and we figure out what happened, and if we have a different
10 view, we'll bring that to you in the morning. If we have the
11 same view, we'll bring that view to you in the morning.

12 THE COURT: I hate to replot ground that we've
13 already covered. We've already done that once by going through
14 and spending quite a bit of time over the admissibility of
15 these documents. As the record will reflect, we decided that
16 they were not admissible.

17 The State came back and said, Judge, there is no
18 objection in the pretrial order. I applied my usual rule,
19 which is a goose/gander rule. But see if you can provide some
20 clarity by tomorrow morning.

21 MR. JORGENSEN: Yes.

22 MR. EDMONDSON: We will be submitting our bench brief
23 in the morning, because there's at least one of those reports
24 that is clearly objected to. It was the first one in 2003.

25 THE COURT: Well, but you pointed out that 5661

1 wasn't objected to. You're stating that it was listed as a
2 separate exhibit?

3 MR. EDMONDSON: No, it's a different number.

4 THE COURT: Well, but it was offered as 5661.

5 MR. EDMONDSON: 5107 is the one that was objected
6 to. It's the first of the coordinated reports dated in 2003.

7 THE COURT: I take it, then, 5107 is the very same
8 document as 5661?

9 MR. EDMONDSON: It's the same report, different year,
10 I believe.

11 THE COURT: 5661 is 2003.

12 MR. EDMONDSON: We'll be preparing our brief, in any
13 event.

14 THE COURT: Let me just say this. If it's the same
15 document, 5107 is the same as 5661, and the defendants
16 interposed an objection, the Court's original ruling is going
17 to apply.

18 MR. JORGENSEN: I believe that's the case,
19 Your Honor. I apologize that the parties did not do better,
20 but each of these document is on the list at least twice, and I
21 think three times. We will iron it out tonight, if we have to
22 stay up all night so that we don't waste any more --

23 THE COURT: Well, there's no doubt that there are
24 tens of thousands of documents that you all wish to get in in
25 these 50 days of trial. Let's move on.

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TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
OCTOBER 1, 2009
BEFORE THE HONORABLE GREGORY K. FRIZZELL, DISTRICT JUDGE
VOLUME V, A.M. SESSION

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1 but I wanted to start with an apology today. I owe you an
2 apology. I try to be very correct when I tell you things, but
3 yesterday afternoon I told you two things: One of them was
4 right; one of them was wrong.

5 The right point was the point you just said, that
6 these exhibits, some of them are listed multiple times, and
7 that objections were made and, through a clerical error,
8 apparently the objections were not always made; they were only
9 made once.

10 But then I rattled off a bunch of numbers, and I was
11 wrong on the numbers. I had the wrong list of numbers in front
12 of me. I apologize to you. I have the right list here.

13 THE COURT: Let's see if we can straighten this out.

14 MR. JORGENSEN: I should have listened to the Court
15 yesterday, because you said the first one on the record -- I'm
16 reading from -- I guess -- I don't know -- I'm paraphrasing
17 from yesterday's temporary transcript. You said, "I take it,
18 then, 5107 is the very same document as 5661." And that is
19 true. And then Mr. Edmondson said, "It's the same report,
20 different year, I believe." And then you said, "Let me say
21 this. If it's the same document -- 5107 is the same as 5661,
22 and the defendants interpose an objection, the Court's original
23 ruling is going to apply."

24 And I should have listened to you, because you're
25 exactly right; 5107, to which there is an objection, is the

1 same as 5661. And for a clerical error reason, there is no
2 objection on 5661.

3 THE COURT: Obviously, it was a clerical error in
4 both camps, because it shouldn't be listed twice, but at the
5 same time, there was not an objection listed as to the
6 identical exhibit. Go ahead. Is there a parallel listing for
7 5662 --

8 MR. JORGENSEN: Unfortunately, for 5662, 5663 and
9 5665, there is not a parallel listing. And we, through
10 clerical error, just did not get an objection in, so that's
11 where they stand. 5664 is also 980, and 980 does have an
12 objection on it.

13 THE COURT: But I don't believe 5664 was offered.

14 MR. JORGENSEN: It was not offered into evidence.

15 THE COURT: What about 5666?

16 MR. JORGENSEN: I came unprepared for that. I'm
17 sorry, I don't know.

18 THE COURT: Well, this will be an interesting thing
19 for the Tenth Circuit to try to straighten out.

20 MR. BULLOCK: Could I be heard on this issue?

21 THE COURT: Absolutely. This is what this process is
22 all about. It's just that we've spun our wheels so long and,
23 you know, we've got supposedly 50 days. It looks like we may
24 be here until the new year, gentlemen, and ladies.

25 MR. ELROD: Can I say something on this issue before

1 Mr. Bullock speaks?

2 THE COURT: I've recognized Mr. Bullock first.

3 Mr. Bullock, will you defer, sir.

4 MR. BULLOCK: Go ahead.

5 MR. ELROD: That's fine.

6 THE COURT: No, Mr. Elrod, go ahead.

7 MR. ELROD: Your Honor, I think our frustration grows
8 out of the fact that it has already been mentioned that the
9 Illinois River Basin surely is one of the most studied rivers
10 in the history of the world. There are beau coup reports
11 available and there have been so many studies done and so many
12 reports.

13 And one thing I learned as a young lawyer is that a
14 piece of paper will sit there and let you write whatever you
15 want to on it. And the -- so some of those studies that you
16 may or may not admit may have been done with the kind of rigor
17 that's required by the courtroom. Others may not.

18 THE COURT: I fully understand. We've already seen
19 both types in one day. Go ahead.

20 MR. ELROD: Some of them may be trash. We are
21 incapable of cross-examining those people.

22 THE COURT: That's why you need to interpose an
23 objection.

24 MR. ELROD: That's right.

25 THE COURT: That's what this is all about. I dare

1 not guess how much money has been spent on both sides of the
2 aisle here. You need to address this with precision and rigor.

3 MR. ELROD: I agree with that. The only point I want
4 to make before Mr. Bullock gets up is that I hope and I assume
5 and I know that Your Honor, if you admit these reports --

6 THE COURT: I've already admitted them.

7 MR. ELROD: Then when you begin reading those --

8 THE COURT: I've already looked at them, and part of
9 them are trash. But there was no objection interposed.

10 MR. ELROD: I understand.

11 THE COURT: Let's move on.

12 MR. BULLOCK: Okay.

13 THE COURT: Go ahead. First of all, Mr. Bullock with
14 regard to 5107 and the objection that was, in fact, interposed,
15 how do you propose the Court address that?

16 MR. BULLOCK: First of all, they're not exactly the
17 same.

18 The 5107 is 25 pages of the report. And it had a
19 hearsay objection to it.

20 THE COURT: I suspect I need to look to see how 5107
21 and 5661 differ or are similar.

22 MR. BULLOCK: 5661 has all of the appendices to it,
23 and it is a 125-page report.

24 MR. JORGENSEN: I may be able to resolve that by
25 conceding Mr. Bullock's point. 5107 is the report without its

1 appendices, and that's objected to. 5661 includes the
2 appendices, and that's where the objection was missed.

3 Let me just say if, on the narrower one, you say it's
4 hearsay, then it doesn't become not hearsay by adding the
5 appendices.

6 MR. BULLOCK: So, I could go into arguing that, but
7 it appears to me that -- well, there are duplicates in both
8 lists, Judge. I have here a list of 200 of the defense
9 exhibits where we specifically said they were duplicates of
10 others. I know there are others.

11 I recall doing Dr. Harwood's exhibits, and there were
12 multiple -- defendants had put in multiple duplicates of it. I
13 worked hard to try to be sure that the same objection I made to
14 one was made on the iteration of it.

15 Now, I don't know that I did that. But it appears to
16 me that the rule needs to be, if we're to get through this,
17 that the exhibit number that you offer is either objected to on
18 the pretrial order or it isn't.

19 THE COURT: No, I'm sorry, I said the rule yesterday.
20 It's your job to make sure that there are no duplicates. If an
21 objection has been interposed as to that exhibit, I'm going to
22 credit either one of you, goose or gander, with that
23 objection.

24 The objection imposed as to 5107 applies -- applies
25 to 5661. The objection is sustained. 5661 is no longer

1 admitted because an objection was made as to 5107, which was
2 the identical document, albeit without the exhibits. 5107
3 references those attachments, but does not contain -- but 5662,
4 -663, -665 and -666 remain admitted.

5 Is there anything else?

6 MR. BULLOCK: One final thing, and very briefly.
7 Yesterday Mr. Jorgensen also said that he had an e-mail from my
8 office which reflected that these exhibits had been objected
9 to. We spent several hours last night; that would have been a
10 serious mistake on my office's part. And I know it would have
11 been made in good faith, but a serious mistake.

12 There was no mistake there. The exhibit as sent to
13 the Court and as sent to the defendants was the same, and I'm
14 pleased that we've resolved that.

15 THE COURT: I note that the similar comment wasn't
16 made this morning, so I take it that you're correct on that,
17 Mr. Bullock. Correct, Mr. Jorgensen?

18 MR. JORGENSEN: Yes. I apologized to Mr. Bullock
19 last night for that numbers mistake that I mentioned this
20 morning, and again I apologize to you for getting that wrong.

21 THE COURT: Now that we've plowed the same ground
22 four times, let's see if we can progress. You may retake the
23 stand, sir.

24 Would it be proper for the Court to make its ruling
25 with respect to these advertisements, Oklahoma Exhibit 335 and